

Reams, Susan A

From: Joe Gilliam [joegilliam@ogia.org]
Sent: Thursday, August 10, 2006 3:12 PM
To: Reams, Susan A
Subject: Comment for Three-Tier Task Force

Submitted by Joe Gilliam, President, Northwest Grocery Association (NWGA)
 Representing over 85% of the Retail Grocery Market in Oregon And Washington.

I have reviewed the minutes of the first three meetings and on behalf of the Northwest Grocery Association (NWGA) I submit the following concerns and recommendations:

Given the State's position to appeal the Costco decision, the Task Force has two basic choices. To provide a temporary strategy that embraces extending the status quo, or a leadership strategy that can be held in abeyance until the Costco litigation is final.

The status quo strategy relies on two components. First, it accepts the notion that the Costco suit will more than likely be overturned on appeal and major reforms will not be required. The NWGA cannot support this position as the majority of the case consists of findings of fact and there is little legal meat to chew on at the appeals level. You should note that the Legislature chose this route on the direct delivery to retailers issue and drew the ire of the Court. Second, if the case is upheld on appeal and the Task Force has failed to address the key components of Washington's three tier system that are in violation of the United States Constitution, the delay in offering a leadership strategy to the Legislature will cause the LCB to fail in one of its three key charges of its mission statement of ensuring orderly market conditions.

It is the view of the NWGA that this task force should have as its first priority to provide leadership to the Legislature in response to the Court's admonishment,

"The Court's ruling will require (emphasis added) changes in Washington's regulatory system for beer and wine. It is the job of the Washington Legislature and not this Court to determine how to best revise Washington's system in a manner that is consistent with the United States Constitution and federal law. The Court urges the Legislature to do so with dispatch." (Costco Wholesale v. Robert Hoen, et al., Findings of Fact and Conclusions of Law, page 21)

The Leadership strategy requires no Task Force member to surrender their legal positions on any of the issues before the court, but it does require that the Task Force consist of market representatives that have the vision to create a contingency plan that will meet the standards of the Sherman Act if the Costco Suit is upheld.

After reviewing the minutes, it appears that a significant portion of the group would like to adopt the status quo approach. NWGA urges the committee to move forward with a Leadership approach. The NWGA offers the following recommendations:

Costco Litigation Contingency Plan

Post and Hold, Uniform Pricing, Delivered Pricing, Minimum Mark Up, and Volume Discounts:

Issue: The Court has rejected the argument that these pricing schemes affect the LCB's mission statement regarding temperance, tax collection, and public safety.

Recommendation: Adopt the Court's position on all pricing issues. However, NWGA believes that all parties share the position to prevent the dumping of cheap beer/wine on the market, so we recommend the Task Force adopt the Court's advice (Findings of Fact and Conclusions of Law document, page 12, (27)) to enforce the existing statute that bans the sale of below-cost beer and wine, and to that end, *"...the state could simply require suppliers and distributors to keep all purchase and sales records on site for inspection by the LCB."* Any other attempts to control pricing will most likely run afoul of the Sherman Act. The Court clearly states that the LCB's position on using price as a modifier to consumption is at best inconsistent. The Court goes further to suggest that if price is a modifier, that the Legislature already has the ability to raise taxes on alcohol.

Ban on Credit Sales:

Issue: This is the most blatant of all the violations to the Sherman Act, but was imposed with good intentions. In 1934 organized crime had a grip on the wholesaling of beer, wine, and spirits. This group used the concept of credit to leverage forcible ownership of retail establishments to expand their illegal operations. However, 70 years later the ban on credit sales serves no purpose in meeting the mission statement of the LCB. No evidence in the Costco suit was offered to the contrary.

Recommendation: Any attempt to regulate the credit terms between individual companies will be at risk of violating the Sherman Act. NWGA offers two recommendations;

- 1) Remove all references to banning credit terms and let the market determine credit terms as it does with all the other products in the food and beverage markets. In no case should the State require credit to be offered to every retailer regardless of their credit risk. There will be cases where a retailer will not have the financial depth to qualify for credit.
- 2) For a finite period of time the State should provide an interest free financing mechanism to wholesalers, or a phase in period, to mitigate the transition from cash to credit. This should be done regardless of the outcome of the Costco litigation.

Central Warehousing:

Issue: This issue may be the strongest argument that the Tied-House laws do not affect the LCB Mission Statement. Whether the beer and wine is delivered at store level by distributors, or from a retailers central warehouse, the affect on temperance, tax collection and public safety is absolutely zero. It is invisible to the public. Wholesalers may oppose the competition from manufacturers that choose to ship direct, but any attempt to prevent such competition would be in violation of the Sherman Act and the Court's explicit ruling. The real world affect will be even less as many retailers of differing sizes and geographical locations will choose to continue delivery from wholesalers that can offer cheaper, and more efficient means of delivering product.

Recommendation: Leave delivery issues to the free market.

Ban on Retailer-to-Retailer Sales:

Issue: This issue is the only issue turned down by the Court and Costco did not offer a great deal of evidence to support their claim

Recommendation: Leave the ban in place.

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